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IN THE UTAH SUPREME COURT

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	Case No. 20090080-SC
VICTOR HERNANDEZ,	:	
Defendant/Appellant.	:	Appellant is incarcerated

REPLY BRIEF OF APPELLANT

Interlocutory appeal from a final order denying Appellant's request for a preliminary hearing on the charges of Negligent Homicide, a class A misdemeanor, under Utah Code Ann. § 76-5-206, Obstruction of Justice, a class A misdemeanor, under Utah Code Ann. § 76-8-306, Unlawful Sale/Supply of Alcohol to Minors, a class A misdemeanor, under Utah Code Ann. § 32A-12-203, and Possession of Drug Paraphernalia, a class A misdemeanor, under Utah Code Ann. § 58-37A-5, entered in Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Michele M. Christiansen, presiding.

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ARGUMENT

In its response, the State abandons the issues raised below and argued in the Brief of Appellant, and instead raises two new issues which it argues support the district court's denial of Mr. Hernandez's request for a preliminary hearing.

First, the State argues that article I, section 13 (*hereinafter* art. I, §13), of the Utah Constitution refers exclusively to the Fifth Amendment of the Constitution of the United States of America, meaning that because class A misdemeanors are not indictable offenses under the federal Constitution, they are not governed by art. I, §13. Br. of Appellee, at 4-6. Next, the State argues, in the alternative, that the probable cause statement included with informations satisfies the state constitutional requirement for a preliminary hearing. *Id.* at 6.

These arguments ignore a basic principle of constitutional law and the plain text of our State Constitution. An analysis of the issues raised by the State will show that the State's arguments are without merit.

Because the State's response has raised issues which were not considered in the Brief of Appellant, Mr. Hernandez's reply brief will only focus on these new issues. Although the focus of the issue has changed, the issues argued in Mr. Hernandez's response, and in his original brief, provide this Court with the controlling analysis and interpretation of art. I, §13, which requires a reversal of the district court's final order which denied Mr. Hernandez's request for a preliminary hearing.

I. ARTICLE I, SECTION 13, OF THE UTAH CONSTITUTION, REFERS TO UTAH TERRITORIAL LAW, THEREBY REQUIRING PRELIMINARY HEARINGS TO BE HELD IN ALL CASES OF CLASS A MISDEMEANORS PROSECUTED BY INFORMATION

To clarify the first issue raised by the State, that art. I, §13, of the Utah Constitution refers to the Fifth Amendment of the United States Constitution, a brief analysis of the development of Utah's territorial laws, and their interaction with the United States Constitution, is necessary.

It is well settled that the United States Constitution is the supreme law of the land, providing the floor below which protections may not fall, not the ceiling. *U.S. v. Seljan*, 547 F.3d 993, 1013-14 (9th Cir. 2008) (Callahan concurring). As such, Congress remains free to provide greater statutory protections than those contemplated by the Constitution. U.S. Const. art. I, §8, cl. 18 (vesting in Congress the power to make all laws necessary and proper for executing all powers Congress is vested by the United States Constitution).[1]

[1] *See also Lovelace v. Lee*, 472 F.3d 174, 186 (4th Cir. 2006) (Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 "to afford [inmates] greater protection of religious exercise than what the Constitution itself affords"); *U.S. v. Jones*,

The State's response fails to consider this well-settled principle of constitutional law.

The power to make "all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" was vested in Congress by the Untied States Constitution. U.S. Const. art. IV, §3, cl. 2. Acting under this power, on September 9, 1850, the United States Congress passed "An Act to establish a territorial Government for Utah" (*hereinafter* Organic Act). 31st Cong. Sess. I, ch. 51, 9 Stat. 453 (1850). The Organic Act vested the legislative power for the Territory of Utah in a governor and legislative assembly. *See* Organic Act, Section IV.[2] This legislative power "extend[ed] to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this act." *Id*. at VI.

All laws passed by the territorial legislative assembly and governor were required to "be submitted to the Congress of the United States, and if disapproved [were] null and of no effect." *Id.* Any enactment of Utah's territorial legislature was, therefore, susceptible of being disapproved by Congress and rendered invalid; but, if an enactment was not disapproved by Congress, then it was valid, so long as it did not conflict with the

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410 F.Supp.2d 1026, 1030-1031 (D.N.M. 2005) (Congress may afford greater protection to a defendant's right to be present at sentencing, but not allow certain types of waiver, whereas the Constitution might not prohibit it); *U.S. v. Brainer*, 691 F.2d 691, 698 (4th Cir. 1982) (The Sixth Amendment, however, merely secures certain minimal trial rights against encroachment by government. In no way does it prevent Congress from according the accused more protection than the Constitution requires, nor does it preclude Congress from acting on the public's interest in speedy justice).

[2] The Organic Act may be found at the following address: http://content.lib.utah.edu/cdm4/document.php?CISOROOT=/uthisstat&CISOPTR=448&REC=3

United States Constitution or federal legislation. *State v. Norman*, 52 P. 986, 988 (Utah 1898).

The laws of the Territory of Utah, compiled by the territorial legislature in 1888 and published as the Compiled Laws of Utah, Volume I and II, were, therefore, passed with the approval of the United States Congress. *Id.*; Organic Act, Section IV. These territorial laws added to existing constitutional protections, and created the legal framework for the Territory and State of Utah. *Norman*, 52 P. at 988; *see also* Utah const. art. XXIV, §2 (territorial laws in force in 1896, which were not "repugnant" to Utah's Constitution, were required to remain in force until they expired, or were altered or repealed by the state legislature).

Among the protections expanded by Utah's territorial legislature was the federal constitutional requirement that "capital, or otherwise infamous crime[s]" be prosecuted by indictment. U.S. Const. amend. V. Under territorial law, all offenses punishable by a fine of more than three hundred dollars, imprisonment of more than six months, or both, were required to be prosecuted by indictment. Compiled Laws of Utah, Vol. II, §4783 s.3 (1888) (Every public offense must be prosecuted by indictment, except: [o]ffenses triable in justices' and police courts)[3]; *id.* at §3023(3) (justice and police courts had jurisdiction over "all misdemeanors punishable by a fine less than three hundred dollars,

[3] Volume I of the 1888 Compiled Laws of Utah may be found at the following address: http://content.lib.utah.edu/cdm4/document.php?CISOROOT=/uthisstat&CISOPTR=5872&REC=10
Volume II of the 1888 Compiled Laws of Utah may be found at the following address: http://content.lib.utah.edu/cdm4/document.php?CISOROOT=/uthisstat&CISOPTR=4150&REC=11

or imprisonment in the county jail or city prison not exceeding six months, or by both such fine and imprisonment"). This requirement not only encompassed felonies, as required by the Fifth Amendment, but also included some misdemeanors, commonly referred to as "high", "gross", or "indictable" misdemeanors. *Blacks Law Dictionary*, 841, 1089 (9th ed. 2009). This class of misdemeanors is known as class A misdemeanors under current Utah law.

When Utah's Constitution was drafted in 1895, it was done with the intent "to make the government for the state complete and operative from the very time of the taking effect of the Constitution." *State v. Lewis*, 72 P. 388, 390 (Utah 1903). To do so, the drafters of Utah's Constitution unequivocally decreed that "[a]ll laws in the Territory of Utah now in force, not repugnant to this Constitution, shall remain in force until they expire by their own limitations, or are altered or repealed by the Legislature." Utah Const. art. XXIV, §2.

This decree includes territorial laws of criminal procedure which mandated that "indictable," or class A, misdemeanors be prosecuted by indictment.

In spite of this clear decree, the State claims that art. I, §13, ignores the territorial requirements so prominently featured in article XXIV, section 2, of the Utah Constitution, and instead refers to the Fifth Amendment of the United States Constitution, a document penned more than a century before the creation of Utah's Constitution.

Analysis of the plain meaning of art. I, §13, its historical context, and this Court's analysis of this provision show that the State's argument is without merit.

a. The *plain text* of article 1, section 13, refers to Utah Territorial law, thereby requiring preliminary hearings to be held in all cases of class A misdemeanors prosecuted by information.

"It is a cardinal rule of construction that constitutions should be construed in light of their framers' intent." *American Fork City v. Crosgrove*, 701 P.2d 1069, 1072 (Utah 1985). In doing so, "the starting point should always be the plain meaning of the textual language." *American Bush v. City of South Salt Lake*, 2006 UT 40, ¶115, 140 P.3d 1235 (Durham, C.J., concurring in part and dissenting in part) (citation omitted). This analysis should include the provision in question as well as "other [related] constitutional provisions." *West v. Thomson Newspapers*, 872 P.2d 999, 1015 (Utah 1994).

An analysis of the plain meaning of art. I, §13, of the Utah Constitution, as well as related constitutional provisions, shows that art. I, §13, built upon existing territorial requirements for the prosecution of indictable offenses by giving prosecutors the option of prosecuting felonies and "indictable misdemeanors" by information.

Art. I, §13, states that "[o]ffenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate . . .." The phrase "[o]ffenses heretofore required," as used in art. I, §13, is tellingly different from the phrase historically used to refer to felonies: "[C]apital or other infamous crimes." *Mackin v. United States*, 117 U.S. 348, 354 (1886) ("Infamous crimes" are defined as crimes "punishable by imprisonment in a penitentiary") (citation omitted). *See also* U.S. Const. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury"). Rather than limiting itself to felonies, the plain meaning of art. I, §13, embraces a

wider variety of crimes than simply felonies, and explicitly directs readers to consider laws governing the Territory of Utah.

Art. I, §13, begins with the word "offenses." Offenses does not just restrict itself to felonies but "may comprehend every crime and misdemeanor, or may be used in a specific sense as synonymous with 'felony' or with 'misdemeanor,' as the case may be . . ." 22 C.J.S. *Criminal Law* §3, at 4 (1989). Offenses encompasses all violations of the law, "often [minor ones]" *Blacks Law Dictionary* 1186 (9th ed. 2009).

Art. I, §13, then directs the reader to consider all requirements existing when our State Constitution was ratified by using the word "heretofore," defined as "[u]p to now; before this time." *Id.* at 795. With these definitions in mind, art. I, §13, may be read as follows: "'[V]iolation[s] of the law,' including minor ones, '[u]p to now, [or] before this time' required to be prosecuted by indictment, shall be prosecuted by information . . ." *Id.* at 1186, 795.

In order to create continuity between the laws of the Territory of Utah and State of Utah, while giving prosecutors the option of prosecuting cases by information (an option only available to states), art. I, §13, codified existing territorial requirements regarding the prosecution of criminal cases in the Territory of Utah, and gave prosecutors the ability to now prosecute these cases by information or indictment.

This conclusion is supported by other related constitutional provisions which also refer readers to territorial laws. Article VIII, section 8, for example, required a consideration of territorial laws when determining the jurisdiction of justice courts by stating that "[t]he jurisdiction of justices of the peace shall be as now provided by law . .

." Utah Const. art. VIII, §8 (amended 1984). Additionally, article XXIV, section 2, of the Utah Constitution, states that "[a]ll laws in the Territory of Utah now in force, not repugnant to this Constitution, shall remain in force until they expire by their own limitations, or are altered or repealed by the Legislature." These provisions furthered the intent of our State Constitution, "to make the government for the state complete and operative from the very time of the taking effect of the Constitution", *Lewis*, 72 P. at 390, by unequivocally linking State laws to Territorial laws, allowing our new State to begin operation with proven, functional laws.

In fact, in considering article XXIV, section 2, the argument can be made that the requirement of continued prosecution of these "indictable misdemeanors" is implicitly required in art. I, §13, and explicitly required in article XXIV, section 2, with the former provision merely adding prosecution by information to the prosecutorial repertoire.

The plain meaning of art. I, §13, and related constitutional provisions, refers to laws of the Territory of Utah. The State's argument to the contrary is without merit.

b. The *intent* of the drafters of article I, section 13, was for this provision to refer to Utah Territorial law, thereby requiring preliminary hearings to be held in all cases of class A misdemeanors prosecuted by information.

Although the starting point of interpretation of constitutional analysis is the text itself, additional clarification may be gained from analyzing historical evidence of the state of the law when our Constitution was drafted as well as the debates at the 1895 Utah Constitutional Convention. *American Bush*, 2006 UT at ¶12; *Crosgrove*, 701 P.2d at 1072-73.

The drafters of the Utah Constitution intended art. I, §13, to refer to territorial laws. This intent is clearly seen in the following exchange from the twentieth day of Utah's Constitutional Convention:

> Section 13 of the preamble and declaration of rights was then read as follows:
>
> > Section 13. Offenses heretofore required to be prosecuted by indictments shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination or with commitment. The grand jury may consist of any number of members, of not less than five nor more than fifteen, as the judge of the court may order. A grand jury may be drawn and summoned whenever in the opinion of the judge of the district, public interest demands one.
>
> Mr. WELLS. Mr. Chairman, I only wish to say before the committee begin firing at this section that it is almost the same as in the states of Michigan, Wisconsin, Washington, Colorado and California, and in all those states I am informed that this system has worked extremely well.
>
> Mr. Bowdle offered the following as a, substitute for section 13:
>
> > No person shall be held to answer in a criminal case except on information after examination and commitment by a magistrate or on an indictment with or without examination and commitment. The grand jury shall consist of seven members and shall be drawn and summoned only when in the opinion of the judge of the district, public interest demands one.
>
> Mr. EVANS (Weber). .1[*sic*.] think the only difference is in the number of grand jurors.
>
> Mr. BOWDLE. Practically that is true. The only objection that I have to the first part of the section is "offenses heretofore required to be prosecuted by indictment," that is taken from the California revised or new constitution, and undoubtedly they had in mind their old constitution. Now, we have no organic existence as a State until this Constitution is adopted and we are admitted, and we are not looking back to a time when, as a state, we were prosecuting crimes in a different way, and it seems to me that it is preferable in that respect. It does not change the substance a particle, but it

> reads here, "offenses heretofore required to be prosecuted by indictment.[*sic*.] Heretofore prosecuted where? Not in the State of Utah.
>
> Mr. EICHNOR. In the Territory.
>
> Mr. BOWDLE. That is the only point I have.

Official Report of the Proceedings and Debates of the Convention: 1895, 313 (1898).[4]

Mr. Bowdle's intention, as is ours, was to clarify to what the phrase "offenses heretofore required" referred. The answer from Mr. Eichnor was clear and to the point: Offenses prosecuted "[i]n the Territory [of Utah]." *Id.* The discussion then continued:

> Mr. MALONEY. Mr. Chairman, the provision as contained here is in the constitution of the state of Washington. *They meant under the territorial system*. Section 25 of the Washington constitution provided that offenses heretofore required to be prosecuted by indictment, and so on_[*sic*.]so that the committee is right and this ought to be adopted as it is.
>
> Mr. CREER. Mr. Chairman, the only objection I have to this section is that it provides that all criminal cases be required to be prosecuted by indictment. There are criminal cases below felonies where they were not required to be prosecuted by indictment, and I think the language as it is now is better, "offenses heretofore required to be prosecuted by indictment," showing there are some offenses heretofore not required to be prosecuted by indictment, and I prefer the section as it is now to the substitute offered to that by the gentleman. I am free to admit, however, that the juries should be fixed at seven.

Id. at 313-14 (emphasis added). Mr. Bowdle's substitute, which would have required the prosecution of *all* offenses by information, was ultimately rejected in favor of existing territorial requirements discussed above. *Id.* At no point during the debate over art. I, §13, was the United States Constitution, much less the Fifth Amendment, mentioned.

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[4] The Official Report of the Proceedings and Debate of the convention: 1895 may be found at the following address:
http://www.le.utah.gov/documents/conconv/utconstconv.htm

The drafters intent that art. I, §13, refer to territorial laws was clearly stated during the debates over the provision.

That the drafters intended art. I, §13, to refer to territorial laws is further supported by the state constitutions on which this provision is based. During the debates, the Constitutions of California and Washington were described as having similar provisions to art. I, §13, in that they both referred to the laws in existence prior to their enactment. In 1895, the "revised or new" Constitution of the State of California referred to "[o]ffenses heretofore required to be prosecuted by indictment . . ." Cal. Const. art. I, §8.[5] Mr. Bowdle's reference to California's new Constitution specified that it "had in mind [California's] old constitution."[6] Official Report of the Proceedings and Debates of the Convention: 1895, 313 (1898).

Next, the Constitution of the State of Washington was discussed. As with California, the Washington Constitution then contained language identical to that of art. I, §13, of our State Constitution. *Id.* As Mr. Maloney stated, this provision "meant under the territorial system." *Id.*

As shown by these debates, the intent of the drafters of the Utah Constitution was that art. I, §13, refer to territorial laws. To do so, the drafters considered other constitutions which successfully referred to prior or territorial laws, and copied their language. *Id.* To the drafters of Utah's Constitution, the answer to the question of what

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[5] California's current constitution reads "Felonies shall be prosecuted as provided by law, either by indictment or, after examination and commitment by a magistrate, by information." Cal. Const. art. I, §14.

[6] "No person shall be held to answer for a capital or otherwise infamous crime, . . . unless on presentment or indictment of a grand jury." Cal. Const. art. I, §8 (1849).

"offenses heretofore required" referred was clear: Offenses heretofore required to be prosecuted by indictment "[i]n the Territory." *Id.*

The drafters' intent that art. I, §13, refer to territorial law is also seen through other provisions of the Utah Constitution. Consider, for example, article VIII, section 1, of our State Constitution. This provision vested the judicial power of the state "in a Supreme Court, in a trial court of general jurisdiction known as the district court, and in such other courts as the legislature by statute may establish." Utah Const. art. VIII, §1. Although similar to article III, section 1, of the United States Constitution, the drafters' intent of article VIII, section 1, was not to echo the Federal Constitution but to streamline exiting territorial laws which provided for a Supreme Court, district court, probate court and justices' court. *See* Compiled Laws of Utah, Vol. II, §3001 (1888); Official Report of the Proceedings and Debates of the Convention: 1895, 492-93, 1316 (1898) (to make courts of the State of Utah more efficient, the judiciary committee eliminated probate courts).

During the debates on article VIII, the onus was not on what was required by the Federal Constitution, but on what had worked under territorial law. The Federal Constitution was not discussed during these debates. Only territorial laws, the needs of the counties, and the effectiveness of existing territorial laws were discussed. *See* Official Report of the Proceedings and Debates of the Convention: 1895, 1315-17, 1321, 1323, 1327-28 (1898).

This omission does not suggest a lack of respect for, or consideration of, the United States Constitution, but it demonstrates the drafters' understanding that the laws of the Territory of Utah had already passed constitutional muster. Organic Act, Section

VI; *Norman*, 52 P. at 988. For the drafters of our State Constitution, there was no need to mess with a good thing. Rather than start from scratch, they focused on refining territorial laws while taking advantage of new opportunities, so as "to make the government for the state complete and operative from the very time of the taking effect of the Constitution." *Lewis*, 72 P. at 390. For this purpose, art. I, §13, was patterned on provisions from other constitutions which successfully referred to territorial, or previous, laws.

Art. I, §13, was drafted with the intent that it refer to the laws of the Territory of Utah, which clearly required the prosecution of classes of offenses now known as class A misdemeanors by indictment. Art. I, §13, therefore, requires preliminary hearings to be held in cases of class A misdemeanors which are prosecuted by information.

c. ***This Court* has consistently interpreted article I, section 13, as referring to Utah Territorial law, thereby requiring preliminary hearings to be held in all cases of class A misdemeanors prosecuted by information.**

That art. I, §13, of the Utah Constitution refers to territorial laws is a concept which this Court has clearly understood and discussed since our State Constitution was ratified. It is, in fact, a concept which this Court has relied upon as a fact in reaching its holdings on other issues. An analysis of this Court's discussions of art. I, §13, show that the phrase "[o]ffenses heretofore required to be prosecuted by indictment" refers to territorial laws.

In *State v. Nelson*, this Court held that a defendant who was convicted of having committed the crime of carnal knowledge of a female under 18 and over 13 years of age, an indictable misdemeanor, was denied a fair trial because the date of the offense alleged

at trial was different from that which was contained in the information, and presented at the preliminary hearing. 176 P. 860, 864 (Utah 1918).

In reaching its conclusion, the *Nelson* Court noted that art. I, §13, of the Utah Constitution was

> [P]lain and unequivocal. Its meaning cannot be misunderstood by any one who reads it with ordinary care. It means that a felony or an indictable misdemeanor, after the adoption of the Constitution, could only be prosecuted in one of two ways: (1) By information after examination and commitment by a magistrate, unless an examination be waived by the accused with the consent of the state; and (2) by indictment with or without such examination and commitment.

Id. at 861.

In *State v. McIntyre*, a defendant convicted in district court of the crime of conspiracy to commit extortion, an indictable misdemeanor, moved to vacate his conviction, arguing that the district court erred in holding a preliminary examination on his case. 66 P.2d 879, 880-81 (Utah 1937). Article VIII, section 21, of the Utah Constitution[7], he argued, limited the power of district court judges to hold preliminary hearings only in cases of felonies. *Id.* at 881.

The *McIntyre* Court rejected this argument, finding that article VIII, §section 21, said "may hold," which on its face is not a prohibition on holding preliminary examinations on cases other than felonies. *Id.* In reaching this decision, the *McIntyre* Court noted that because conspiracy to commit extortion "was an offense required to be prosecuted by indictment" *prior* to the adoption of the State Constitution, under art. I,

[7] "Judges of the Supreme Court, District Courts, and justices of the peace, shall be conservators of the peace, and may hold preliminary examinations in cases of felony." Utah Const. art. VIII, §21 (repealed 1984)

§13, the offense may "now be prosecuted by information after examination and commitment by a magistrate." *Id.* at 881-82.

In *State v. Johnson*, this Court was asked to decide the proper venue for the commencement of a "non-indictable misdemeanor."[8] 114 P.2d 1034, 1039, 1042 (Utah 1941) *superseded by statute*, Utah R. Crim. P. 12(b)(2), (d) (1992). In his concurrence Justice Pratt noted that territorial laws regarding the jurisdiction of justice courts were codified as State law by article VIII, section 8, of the Utah Constitution. *Id.* at 1043 (Pratt, J. concurring); Utah Const. art. VIII, §8 (amended 1984).

Justice Pratt further noted that the codification of territorial laws in the Utah Constitution is also seen in art. I, §13, which "recognizes that there were certain offenses which were not required to be prosecuted by indictment" and were subject to prosecution before a Justice of the Peace. *Id.* at 1044. Laws indicating that non-indictable misdemeanors "were not to be initiated in the District Court," were passed to conform "to section 13 of Article 1 of the Constitution" which "deal[s] with felonies and indictable misdemeanors but not with misdemeanors." *Id.*

Returning to the case at hand, the State's response discounts the cases cited to in Mr. Hernandez's petition because their analysis of art. I, §13, was deficient, and mostly found in dicta. The State fails to acknowledge, however, that prior to its response, all of the interested parties had conceded that art. I, §13, of the Utah Constitution referred to territorial law. (R. 75-78; 160-62; 168-73; 204-211; 219-28; 236-44).

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[8] The *Johnson* Court ultimately held that although the district court had original jurisdiction over all criminal cases, the proper venue for the case was in "Justices' court." *State v. Johnson*, 114 P.2d 1034, 1043 (Utah 1941).

The sufficiency of the above analysis aside (all of the cases cited above were referenced in Mr. Hernandez's initial petition), the State is correct in its assertion that most references to art. I, §13, of our State Constitution are contained in dicta. But the State misses the significance of this fact.

Never before has the fact that art. I, §13, refers to territorial laws been challenged or questioned. The State's response is the first time in over one-hundred fourteen years that the argument has been made that art. I, §13, of the Utah Constitution refers exclusively to the Fifth Amendment of the United States Constitution, and ignores Utah Territorial law.

The lack of analysis complained of by the State is not due to a mistake which has spanned over one-hundred fourteen years, but it is because it has always been known, accepted and understood that art. I, §13, of our State Constitution refers to Utah Territorial Law.

The prosecution of misdemeanors punishable by fines and/or imprisonment in excess of the jurisdictional limits of Justice Courts (currently fines in excess of one thousand dollars, imprisonment of up to one year, or both) by information, after examination and commitment by a magistrate, was once common in the State of Utah.[9]

[9] *See e.g.*, *State v. Sosa*, 598 P.2d 342, 344-45 (Utah 1979) (discussing the procedure for prosecuting indictable and non-indictable misdemeanors out of a single incident); *State v. Cooley*, 575 P.2d 693, 693 (Utah 1978) (Defendant charged with failure to stop vehicle at the command of a police officer, "an indictable misdemeanor triable only on information or indictment in the district court"); *Atlantic Richfield Co. v. State Tax Commission of Utah*, 504 P.2d 33, 34 (Utah 1972) (Failure to file necessary reports with the State Tax Commission of Utah was an indictable misdemeanor) (citing 41-11-21 U.C.A. 1953); *State v. Callahan*, 488 P.2d 1048 (Utah 1971) (Defendant charged with willfully and

But sometime after 1980 these offenses stopped being properly prosecuted, leading us to the case at hand where Mr. Hernandez's request for a preliminary examination was denied, even though he has been charged with numerous "indictable," or class A, misdemeanors.

For these reasons, State's argument is without merit.

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unlawfully resisting a police officer in discharging or attempting to discharge the duty of his office in making a lawful arrest, an indictable misdemeanor); *State v. Boone*, 483 P.2d 238 (Utah 1971) (Defendant charged with resisting an officer, an indictable misdemeanor); *State v. Brennan*, 371 P.2d 27, 29 (Utah 1962) (Defendant charged with driving while intoxicated and injuring another person in a reckless or negligent manner, an indictable misdemeanor); *State v. Berchtold*, 357 P.2d 183, 184 (Utah 1960) (Defendant charged with negligent homicide, an indictable misdemeanor); *State v. Sandman*, 286 P.2d 1060, 1062 (Utah 1955) ("'Every person who willfully resists, delays or obstructs any public officer in discharging or attempting to discharge, any duty of his office * * * is punishable by fine not exceeding $1,000 or by imprisonment in the county jail not exceeding one year, or by both.' thus constituting an indictable misdemeanor") (citation omitted); *Ogden City v. Adams*, 245 P.2d 851, 852 (Utah 1952) (Provision of the Liquor Control Act, Chap. 43, Laws of Utah 1935, U.C.A. 1943, 46-0-43 et seq., which required district attorneys to represent the State in criminal actions tried in the district court referred to indictable misdemeanors and felonies); *State v. Stewart*, 171 P.2d 383, 385 (Utah 1946) (A person convicted of a second offense of "drunken driving" is punishable as an indictable misdemeanor, in which a defendant so charged would be entitled to a preliminary hearing, and the case would be triable in the district court); *State v. Kallas*, 94 P.2d 414, 421 (Utah 1939) (Defendant charged with common nuisance, under the Liquor Control Act, an indictable misdemeanor); *In re Pearce*, 136 P.2d 969, 970 (Utah 1943) (crime of criminal conspiracy an indictable misdemeanor); *State v. McIntyre*, 66 P.2d 879, 880 (Utah 1937) (Defendant convicted in district court of the crime of conspiracy to commit extortion, an indictable misdemeanor); *State v. Cragun*, 20 P.2d 247, 248 (Utah 1933) (Defendant charged with practicing obstetrics without a license, an indictable misdemeanor); *State v. Olsen*, 289 P. 92, 93 (Utah 1930) (The crime of false imprisonment is included within the crime of kidnapping, the former an indictable misdemeanor and the latter a felony); *State v. Hale*, 263 P. 86, 87 (Utah 1927) ((Defendant charged with treating human ailments without a license, an indictable misdemeanor not triable before city courts).

II. IN CASES PROSECUTED BY INFORMATION, ARTICLE I, SECTION 13, OF UTAH'S CONSTITUTION REQUIRES MAGISTRATES TO CONSIDER AND WEIGH ACTUAL EVIDENCE AND THE SWORN TESTIMONY OF WITNESSES BEFORE THE ACCUSED MAY BE BOUND OVER FOR TRIAL

Art. I, §13, states that in "offenses heretofore required to be prosecuted by indictment" an "examination and commitment by a magistrate" must be held, "*unless the examination be waived* by the accused with the consent of the State . . ." Utah Const. art. I, §13 (emphasis added). In its response, the State argues that the probable cause statement included with informations filed to commence criminal prosecutions of cases involving felonies and class A misdemeanors, satisfies the requirements of art. I, §13. The State's argument is flawed on its face, and in its substance.

On its face, the State fails to explain how the accused can waive the examination of a sworn affidavit that is filed and read by the magistrate before the defendant's involvement with the case.[10] Art. I, §13, clearly suggests that there would be circumstances in which the State and defendant would agree to waive their preliminary hearing and bind the matter over for arraignment and trial. For this to happen, the defendant would have to be involved with the case prior to making a decision regarding the examination and commitment by a magistrate. Because the State's alternative argument ignores this reality, it is without merit.

[10] If the State's argument is true, however, and an information "sworn to by a person having reason to believe the offense has been committed" satisfies the requirements of article I, section 13, our criminal justice system, as currently constituted, violates the rights of the accused in every case of a felony or indictable misdemeanor in that the accused is never given the opportunity to ask that the examination and commitment be waived before it is reviewed by a magistrate.

Additionally, the State's argument that today's preliminary hearing is a legislative gift, and not required by our State Constitution, ignores the constitutional requirements of the "examination and commitment by a magistrate."

This Court has taken great strides to clarify the standards required at different stages of the prosecution of criminal cases. *State v. Virgin*, 2006 UT 29, ¶18, 137 P.3d 787. Thanks to these efforts it is now well understood that "probable cause" is the standard required to issue an arrest warrant and to bind a criminal complaint over for trial. *See, id.* ("[T]he probable cause that the prosecution must establish in a preliminary hearing ... is the same as the probable cause that the prosecution must show to obtain an arrest warrant."); *see also State v. Clark*, 2001 UT 9, ¶16, 20 P.3d 300 ("[A]t both the arrest warrant and the preliminary hearing stages, the prosecution must present sufficient evidence to support a reasonable belief that an offense has been committed and that the defendant committed it") (citation omitted). Whether seeking an arrest warrant, or asking a criminal complaint to be bound over for trial, sufficient evidence must be presented before a magistrate to allow a determination of probable cause.

In its response, the State confuses and misapplies the evidentiary requirements for issuing an arrest warrant with the evidentiary requirements for bindover, arguing that the evidence required to determine probable cause to issue an arrest warrant is all that is required under our State Constitution to bind a case over for trial. When viewed in its proper light, this argument is without merit.

Regarding the initiation of criminal cases, our rules state that "[u]nless otherwise provided, all criminal prosecutions whether for felony, misdemeanor or infraction shall

be *commenced* by the filing of an information[11] or the return of an indictment."[12] Utah R. Crim. P. 5(a) (emphasis added). Although currently called an "information," historically, the document filed to commence a criminal prosecution was called a "complaint."[13] *See State v. Humphrey*, 823 P.2d 464, 466 n.2 (Utah 1991) (under Utah's current statutory scheme, informations have replaced complaints in pre-bindover situations). This changing terminology has resulted in some confusion regarding the requirements for the prosecution of felonies and indictable misdemeanors.

The basic requirements for the initiation of criminal prosecutions have remained consistent throughout the history of Utah. Under territorial law, a criminal prosecution began with a complaint, filed before a magistrate, which was based on, and stated, the information and belief that an offense was committed, and that the accused had

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[11] Although Utah law identifies the document filed to initiate a criminal prosecution and secure the appearance of the accused (by warrant or summons) as an "information," in cases of felonies and class A misdemeanors, this document does not become an "information," as required by our State constitution, until a magistrate has examined the evidence, found probable cause that the accused has committed the crimes alleged in the complaint and ordered the accused to be bound over for trial before the district court. Utah Const. art. I, §13.

[12] Because the issue before this Court is whether a preliminary hearing is required in cases of class A misdemeanors being prosecuted by information, the requirements for prosecuting such cases by indictment under Utah law will not be thoroughly analyzed in this response.

[13] In 1935, the Utah legislature modified the procedure whereby felonies and indictable misdemeanors were filed by enacting "section §105-21-5 (Chapter 118), Laws of Utah, 1935 which by implication says that an information may be used for an offense in which there has been no preliminary hearings. In such a case an oath must be taken to the information. This in effect makes the information a complaint." *State v. Johnson*, 114 P.2d 1034, 1044 (Utah 1941) (Pratt, J. concurring). This enactment is the source of this change in terminology.

committed it. *U.S. v. Eldredge*, 13 P. 673, 675-76 (Utah. Terr. 1887) *appeal dismissed*, 145 U.S. 636 (1887).

Following statehood, criminal prosecutions were required to begin with a "statement in writing" made to a magistrate which stated: "(1) The name of the accused, if known; *** (2) the county in which the offense was committed; (3) the general name of the crime or public offense; (4) the acts or omissions complained of as constituting the crime or public offense named." *State v. Anderson*, 101 P. 385, 386 (Utah 1909) (citation omitted).

Currently, Utah law requires criminal prosecutions to begin with the filing of an information which has been "sworn to by a person having reason to believe the offense has been committed," Utah R. Crim. P. 4(a), and to state the offense being prosecuted in terms "sufficient to give the defendant notice of the charge." Utah R. Crim. P. 4(b).

As stated in Rule 6 of the Utah Rules of Criminal Procedure, the purpose of the affidavit filed with the information is to give the magistrate sufficient information to determine if "there is probable cause to believe that an offense has been committed and that the accused has committed it." If the initial affidavit contains enough information for this determination to be made, the magistrate is required to "issue either a warrant for the arrest or a summons for the appearance of the accused." Utah R. Crim. P. 6(a).

The purpose of the complaint, or information, is to secure the appearance of the accused before a magistrate, and to notify the accused of the charges against them.

Following this initial filing and determination of probable cause, in felonies and class A misdemeanors an "examination and commitment by a magistrate" must be held to

determine if the accused should be required to stand trial on the charges. Utah Const. art. I, §13; *see also Anderson*, 101 P. at 387 (in cases of felonies or indictable misdemeanors, following the filing of the complaint before a magistrate, the case then proceeded to an examination of the evidence, after which an information is filed).

The examination and commitment required by article I, section 13, of the Utah Constitution, "was designed, to some extent, to accomplish the purpose of a presentment by a grand jury[14] under the law as it existed before, in protecting a party against being subjected to the indignity of a public trial for an offense before probable cause has been established against him by evidence under oath." *State v. Spencer*, 49 P. 302, 304 (Utah 1897) (citation omitted). Today, the "examination and commitment" is known as a preliminary hearing.

In Utah, preliminary hearings are adversarial in nature, and provide defendants "the 'opportunity to attach the prosecution's evidence and to present any affirmative defenses.' Although the hearing is not a trial per se, *it is not an ex parte proceeding nor one-sided determination of probable cause . . .*" *Virgin*, 2006 UT at ¶31 (emphasis added) (quoting *State v. Anderson*, 612 P.2d 778, 783 (Utah 1980)). The prosecution must present evidence "sufficient to support a reasonable belief that the defendant

[14] The function of a grand jury cannot be satisfied by a sworn affidavit presented to them by the prosecuting attorney. Grand juries consider and weigh actual evidence. *People v. Robinson*, 21 P. 403, 404 (Utah Terr. 1889) (witnesses must be called to testify at grand jury proceedings); *People v. Greenwell*, 13 P. 89, 91 (Utah Terr. 1887) (grand juries are required to weigh all evidence submitted to them, and when they believe other evidence may "explain away the charge," they are required to order the prosecuting attorney to produce such evidence).

committed the charged crime." *Virgin*, 2006 UT at ¶17 (citation omitted); *see also State v. Ortega*, 751 P.2d 1138, 1140 (Utah 1988).

For nearly the first century of our State's existence the accused were guaranteed the "entire panoply of [rights guaranteed by Utah's Confrontation Clause] at the preliminary examination." *State v. Timmerman*, 2009 UT 58, ¶14, 218 P.3d 590 (citation omitted). In 1995, however, article I, section 12, was amended to limit Utah's Confrontation Clause by adding a second paragraph that allowed the use of reliable hearsay evidence, as defined by statute or rule[15], "in whole or in part at any preliminary examination to determine probable cause . . ." Even under this diminished constitutional standard, an information that contains no evidence other than having been "sworn to by a person having reason to believe the offense has been committed" would not be admissible at a preliminary. Utah R. Crim. P. 4(a).

The primary purpose for the heightened evidentiary requirements of preliminary hearings is to provide the magistrate sufficient information to allow her to ferret out groundless prosecutions before they go to trial, thereby relieving the accused of the substantial degradation and expenses incurred in a modern criminal trial when the charges against the accused are unwarranted, or the evidence insufficient. *Virgin*, 2006 UT at ¶¶19-20, ¶33; *Anderson*, Utah, 612 P.2d at 783-84.[16] This information must be sufficient to allow the magistrate to "observe and assess witness demeanor and

[15] Reliable hearsay is defined by Rule 1102 of the Utah Rules of Evidence.

[16] *See also, e.g.*, Utah Const. art. I, §1 ("All men have the inherent and inalienable right to enjoy and defend their lives and liberties"), *id*. at §7 ("No person shall be deprived of life, liberty or property, without due process of law").

credibility" to determine whether the "evidence is wholly incapable of supporting a reasonable belief as to a part of the prosecution's case." *Virgin*, 2006 UT at ¶31 (citations omitted).

Preliminary hearings give defendants an opportunity to "introduce evidence which tends to exonerate him, or to explain away the charge." *Anderson*, 101 P. at 386; *see also Virgin*, 2006 UT at ¶31 (preliminary hearings give defendants the opportunity to present affirmative defenses). They also "enable the defendant to inform himself of the nature of the accusation made against him . . . and [to be] given an opportunity to *fully* inform himself of the facts and circumstances upon which the state relies to sustain the charge, and be prepared to meet it when he is brought to trial." *Anderson*, 101 P. at 386 (citation omitted) (emphasis added). These hearings also serve as "a means to discover and preserve evidence favorable to his defense." *Kearns-Tribune Corp., Publisher of Salt Lake Tribune v. Lewis*, 685 P.2d 515, 520 (Utah 1984) (citation omitted). Finally, in cases where the defendant ultimately pleads guilty, these hearings may "provide the only occasion for a public hearing of the prosecution's evidence." *Id.*

These purposes and rights cannot be secured by a sworn statement on a piece of paper filed by the state to commence a criminal prosecution. Although such sparse evidence is sufficient to initiate a criminal case, the suggestion that it is all that is required under our State Constitution for preliminary hearings is contrary to our laws and precedent.

Ultimately, the State's argument that a sworn affidavit is sufficient evidence for a preliminary hearing was decided by this Court over one hundred years ago. In *State v.*

Anderson, this Court found that "a complaint which states the name of the crime charged, the time and place of its commission, the name of the accused, if known, and sets out in general terms the acts or omissions constituting the public offense or crime charged" is "lacking in other averments which would be necessary in an indictment or information." 101 P. at 386.

It is for this reason that the arguments raised on appeal by the State are without merit. The preliminary examinations discussed in Rule 7 of the Utah Rules of Criminal Procedure embody the requirements of art. I, §13, of our State Constitution.

CONCLUSION

In conclusion, an analysis of the plain text of art. I, §13, of the Constitution of the State of Utah, shows that this provision refers to territorial laws, and therefore requires preliminary hearings in cases of class A misdemeanors prosecuted by information. This conclusion is supported by the stated intent of the drafters of our State Constitution, as well as this Court's precedent.

Additionally, the purposes of a preliminary hearing, as required by art. I, §13, are not satisfied by a complaint filed with an affidavit sworn to by someone having reason to believe that an offense has been committed, and that the accused committed it.

Mr. Hernandez asks that this Court order the district court to grant his request for a preliminary hearing, and restore the prosecution of class A misdemeanors to the process required by the Utah Constitution, and practiced throughout most of our State's history.

SUBMITTED this 20th day of August, 2010.

/s/
NEAL G. HAMILTON
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, NEAL G. HAMILTON, hereby certify that I have caused to be hand-delivered an original and 9 copies of the foregoing to the Utah Supreme Court, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and 4 copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114; this 20th day of August, 2010.

/s/
NEAL G. HAMILTON

DELIVERED to the Utah Attorney General's Office and the Utah Supreme Court as indicated above this _____ day of August, 2010.

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